IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-6575

ROBERT PAUL LYTLE, Petitioner

-vs-

THE STATE OF OHIO, Respondent

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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ROBERT PAUL LYTLE, Petitioner

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THE STATE OF OHIO, Respondent

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent opposes issuance of a Writ of Certiorari in the within cause, for the reasons that the Petitioner has not exhausted his available state remedies and that the Ohio Supreme Court has decided the federal questions at issue in accord with the applicable decisions of this court.

I. OPINIONS BELOW

The Petition of the Petitioner correctly cites the opinions below.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III. QUESTIONS PRESENTED

1. Whether this court should grant jurisdiction where the Petitioner has not exhausted his available state remedies.

2. Whether the Ohio test or standard of competency of counsel in a criminal case is violative of the Sixth and Fourteenth Amendments of the United States Constitution.

3. Whether this court should decide federal questions raised here for the first time on review of state court decisions where Petitioner failed to raise or preserve such questions in the state courts.

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4. Whether a search of the Defendant's car, pursuant to a search warrant, was contrary to the Fourth Amendment of the United States Constitution.

5. Whether the Ohio death penalty structure violates the Eighth or Fourteenth Amendments to the United States Constitution.

IV. CONSTITUTIONAL PROVISIONS

1. This case involves the Fourth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio law: Ohio Revised Code, Sections 2929.02, 2929.03, 2929.04, 2945.59, 2953.21, 2953.22, 2953.23, and Ohio Rule of Criminal Procedure 41. These sections are set out in full in Appendix A-J.

V. STATEMENT OF THE CASE

On September 13, 1974, Robert Paul Lytle, along with Charles Ellsworth White and David Wesley Arrasmith, were indicted for purposely causing the death of Wallace R. Archibald, while committing kidnapping or aggravated robbery, or while fleeing immediately after committing the above said offenses. The Grand Jury further found and specified that the offense was committed for the prupose of escaping detection; the offense was committed while the offender was committing, or attempting to commit the crime of kidnapping; and the offense was committed while the offender was fleeing immediately after committing aggravated robbery, contrary to Section 2903.01 of the Ohio Revised Code.

Lytle pled not guilty to all charges on October 2, 1974. On that date, he was represented by attorney Larry B. Morris, who had been appointed on September 23, 1974.

On October 23, 1974, defense counsel was heard on a Motion to Suppress all statements made by the Defendant. Mr. Morris also moved the Court to suppress evidence found in a search of Defendant car. Mr. Rodney Keish, Attorney at Law, was also present at the defense table.

After hearing testimony, the court overruled both motions.

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On October 29, 1974, the Court heard the Defendant's Motion for a Change of Venue, Bill of Particulars, and continuance. These three (3) Motions were filed by Mr. Keish with the consent of the Defendant. At this time, Mr. Morris requested the Court's permission to withdraw from the case (R. 5). After determining that the Defendant wanted Mr. Keish to represent him, the Court granted the request of Mr. Morris (R. 18). Dennis L. Sipe was also approved as co-counsel (R. 26). Morris, who had spent in excess of fifty hours on the case at that time, agreed to comply with the Court's order that he turn over the contents of his case file to Keish. At the hearing, it was noted that Mr. Keish had filed a Writ of Mandamus with the Court of Appeals to compel the County Sheriff to allow him to see the Defendant (R. 14). The Court granted the Motion for a Bill of Particulars, (R. 21), granted a two day continuance (R. 26), and overruled the Motion for a Change of Venue (R. 23).

After a week of voir dire, the Jury Trial commenced on November 15, 1974. At the end of the State's case, on November 22, 1974, the State rested. On November 25, 1974, the Jury returned a verdict of "Guilty" to the crime charged and all three specifications on the indictment.

On December 16, 1974, Motions by Mr. Keish for aquittal and a new trial were denied.

January 6, 1975, pursuant to Ohio Revised Code, Section 2929.03 (D), a hearing was held to determine if any mitigating circumstances existed. After hearing the report of two Court appointed psychiatrists, the Adult Probation Department, Defense witnesses, and Counsel's arguments, the Court found that the mitigating circumstances of the Ohio Revised Code, Section 2929.04 (B) were not present. Defendant was thereafter sentenced to the electric chair (R. 64-65).

A timely appeal was brought by a new Court appointed attorney, James F. Cox. The Court of Appeals considered all assignments of error, and affirmed the lower Court's decision. Thereupon, a timely Notice of Appeal was filed by appointed Counsel in the Supreme Court of Ohio.

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The Ohio Supreme Court rendered judgment in this matter affirming the lower court's decision on December 27, 1976. Rehearing was denied on January 20, 1977.

After the Ohio Supreme Court decided the case of State V. Lytle, 48 Ohio St. 2d 391, (1976), the Petitioner-Defendant requested, and was granted, a post-conviction hearing by the Common Pleas trial court, pursuant to Section 2953.21, et. sec., of the Ohio Revised Code. An extensive hearing was held, and the trial court filed a decision on March 29, 1977, denying the Defendant's motion for post-conviction relief. (Appendix A).

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VI. ARGUMENT

1. WHETHER THIS COURT SHOULD GRANT CERTIORARI WHERE THE PETITIONER HAS NOT EXHAUSTED HIS AVAILABLE STATE REMEDIES.

In its Statement Of The Case, Petitioner has conveniently left out the following facts: After the Ohio Supreme Court decided the case of State v. Lytle, supra, the Petitioner-Defendant was granted a post-conviction hearing by the original trial court, pursuant to Section 2953.21 et sec., of the Ohio Revised Code (Appendix E). The sole issue involved in the post-conviction hearing was the question of incompetency of trial counsel under the Sixth Amendment.

This court has stated that it should only review final judgments of the highest available state courts. Costarelli v. Massachusetts, 421 U.S. 193, 196 (1975), Republic Gas Co. v. Oklahoma, 334 U.S. 62, 67 (1948), Gorman v. Washington University, 316 U.S. 98, 100, 101 (1942).

Under Ohio law, the Defendant may appeal the denial of post-conviction relief to the Ohio Court of Appeals pursuant to Ohio Revised Code, Section 2953.23 (B) (Appendix E). A decision to the Ohio Court of Appeals may be appealed further to the State Supreme Court on the post-conviction denial, State v. Hester, 45 Ohio St. 2d 71, 341 N.E. 2d, 304 (1976), State v. Duling, 21 Ohio St. 2d 13, 254, N.E. 2d 670 (1970).

Respondent wishes to bring to this court's attention the fact that at this time the Petitioner has a right under Ohio law to appeal the decision denying him post-conviction relief. Specifically, the judgment entry in this case was filed on May 13, 1977, (Appendix B). Pursuant to Ohio Revised Code, Section 2953.05 (Appendix F), Petitioner has thirty days within which to file his appeal for denial of post-conviction relief. At this time, Respondent has no indication of whether Petitioner-Defendant intends to file this appeal. It is possible, however, if Petitioner does bring a timely appeal that this court would be in the position of deciding whether to intervene in a pending state proceeding.

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It is clear that there is further appellate review possible in the Ohio courts on the issue of competency of counsel which is not separable from the other issues in this case. The reviewing court will be able to examine the extensive record made during the hearing. Ohio Revised Code, Section 2953.23 (B).

This court can only review final judgments rendered "by the highest court of a state in which a decision could be had". 28 U.S.C. 1257. Respondent respectfully submits that because this jurisdictional requirement has not been met, this court should not grant a Writ of Certiorari.

2. WHETHER THE OHIO TEST OR STANDARD OF COMPETENCY OF COUNSEL IN A CRIMINAL CASE IS VIOLATIVE OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Questions one and two argued by the Petitioner actually present one issue: Whether the Ohio Supreme Court's standard or test of competency of counsel in a criminal case is constitutional. In State v. Hester, supra, the Ohio Supreme Court stated that:

> In formulating a test for effective counsel pursuant to the Fifth, Sixth, and Fourteenth Amendments and Sections 10 and 16 of Article I of the Ohio Constitution . . . we hold the test to be whether the accused, under all the circumstances, including the fact that he had retained counsel, had a fair trial and substantial justice was done. (Hester at 79).

Respondent wishes to bring to this Court's attention the fact that the Hester court formulated its test for effective counsel in accord with the decisions reached in the landmark case of Powell v. Alabama, 287 U.S. 45 (1932) and also Beasley v. United States, 491 F 2d 687 (6th Cir,) 1974. (Hester at 77-78).

The phrase "effective assistance of counsel" is a term of art. Courts are generally reluctant to enunciate specific prophylactic rules of conduct for defense counsel. Beginning with the often cited decision in Powell v. Alabama, supra, there has developed a plethora of case authority on the meaning of "effective and substantial aid . . ." Powell, pg. 53. The "farce or mockery of justice" test, Williams v. Beto, 354 F. 2d 698, (1965), had gradually been rejected in Ohio with the United States Court of Appeals for the Sixth Circuit now requiring that counsel

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render "reasonably effective assistance", Beasley v. United States, supra, pg. 696.

In State v. Lytle, supra, the Ohio Supreme Court held that the Petitioner had not established that his trial counsel was ineffective within the guidelines set out in Hester.

In response to Petitioner's third question, Respondent further contends that Petitioner was not denied his right to effective assistance of counsel under either the Hester or Beasley standard. It should be noted that at the post-conviction relief hearing, the Petitioner did not bring forth any new evidence which could have been placed before the trial court. Petitioner's attorney was therefore not ineffective in this crucial aspect. Counsel also filed all of the procedural motions usually made in a criminal trial. At the hearing for post-conviction relief the court found the fact that the Defendant rested without producing evidence was a trial tactic which counsel and the Defendant had discussed. (Appendix A).

It should be remembered that when a Defendant rests without presenting any witnesses, he receives the benefit of the presumption of innocence. The burden of proof has not been shifted. If he, through his chosen counsel, decides not to present any witnesses, and to rest on the presumption accorded to him by law, it is submitted that he cannot complain that the tactic did not work.

3. WHETHER THIS COURT SHOULD DECIDE FEDERAL QUESTIONS RAISED HERE FOR THE FIRST TIME ON REVIEW OF STATE COURT DECISIONS WHERE PETITIONER FAILED TO RAISE OR PRESERVE SUCH QUESTIONS IN THE STATE COURTS.

It is well settled principle of law that if a State Court does no more than discuss the interpretation of a State statute, without considering such interpretation in light of a federal question properly presented to it, the Supreme Court cannot consider the federal points. Beck v. Washington, 269 U.S. 541, 549 550 (1962). Respondent contends that it is clear that nowhere in the proceedings below has the Petitioner raised a federal question regarding the trial court's erroneous admission into evidence of the "like and similar act" testimony pursuant to Ohio Revised Code,

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Section 2945.59 (Appendix G).

In Cardinale v. Louisiana, 394 U.S. 437 (1969), the Court stated, "It was very early established that the court will not decide federal constitutional questions raised here for the first time on review of state court decisions, " 294 U.S. at 348. This position has been reaffirmed numerous times by simply stating as the court did in Tacon v. Arizona, 410 U.S. 351, 353 (1973), "We cannot decide issues raised for the first time here".

Respondent brings this issue to the court's attention for the reason that it feels that granting review based on the question presented in the Petitioner's fourth question would only result in this court's dismissing the case for granting certiorari improvidently once a review of the record was made. Attached hereto as Appendix H is a complete list of the assignments of error and propositions of law properly raised by the Petitioner in the state courts.

The issues raised here by the Petitioner in the fourth question, although not raised or preserved in the courts below, has been ruled upon by the United States Supreme Court in the case of State v. Hahn, 50 O. App. 178, appeal dismissed 305 U.S. 557 (1938), motion to certify overruled 133 O. St. 446, where the case was dismissed for lack of a substantial federal question.

It has been held that Ohio Revised Code, Section 2945.59, is merely expressive of the common law and is a rule of evidence and not a rule of the substantive law. State v. Pack, 18 O. App. 2d 76, 47 O.O. 2d 113 (1968). The Pack court cited State v. Hahn in holding the statute to be constitutional.

Respondent further contends that the State Supreme Court was correct in finding that the error committed by the trial court in admitting such testimony did not affect any substantial rights under 28 U.S.C. 2111 under the "reasonable doubt" test of Chapman v. California, 386 U.S. 18 (1968). In State v. Lytle, supra, the court held that the error committed, looked at in the light of the other evidence, particularly Petitioner's confession, was harmless beyond a reasonable doubt, Lytle at 403-404. The Respondent respectfully submits that this court should not raise this evidentiary question to a level of constitutional import.

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Where a federal question is raised before the court for the first time on review of state decisions, it is submitted that this court should not decide that issue.

4. WHETHER A SEARCH OF THE DEFENDANT'S CAR, PURSUANT TO A SEARCH WARRANT, WAS CONTRARY TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner argues that the evidence obtained during the search of his vehicle should be excluded, since the search violated the Fourth Amendment perscription against general exploratory searches. The search warrant involved in this case specified that the affiant sought to recover one hundred two (102) packages of cigarettes, a pair of field glasses, an electric calculator, and two hundred dollars ($200.00) in change taken from a juke box and a cigarette vending machine. The offenses which gave rise to the Appellant's possession of these goods were the breaking and entering of a laundermat and a high school. The inventory listing the property seized discloses that although none of the specified items were found, the officers seized two (2) baseball bats, a .25 Colt pistol and an assortment of tools, including chisels, crowbars and a hacksaw.

The Ohio Supreme Court found that the searching officers could reasonably have believed that the items seized or either the "fruits of a crime" (the baseball bats) or "weapons or other things by means of which a crime has been committed or reasonably appears about to be committed" (the tools and the pistol). The Ohio Supreme Court's decision was based on Ohio Criminal Rule 41 (B) (See Appendix I) State v. Lytle, supra, pg. 400.

Ohio Criminal Rule 41 (B)(1) authorized the issuance of a warrant for the seizure of any evidence of a crime. Petitioner appears to be arguing for a return of the Mere Evidence Rule. This one-time rule represented the constitutional doctrine limiting seizures of evidence to contraband in the fruits of and tools used to commit a crime. The basis of the Mere Evidence Rule was that the constitution protected property interests, and in items that had merely evidentiary value, the property interest of the owner was superior to that of the state. In items that were subject to

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seizure, the Defendant had either never obtained a valid interest in the property, (the fruits of a crime) or could never obtain a legally recognizable interest in the property (contraband) or had lost the superior interest because the items were used to commit a crime (tools). The rule was the subject of extensive criticism and frequently circumvented. The rule was finally abandoned by this court in Warden v. Hayden, 387 U.S. 294 (1967), on the theory that the constitution protects privacy and not property, and privacy is not disturbed more by a search for mere evidence than one for other property.

The Ohio court, subsequent to Warden v. Hayden, supra, made it clear that the Mere Evidence Rule was no longer applicable, at least to warrantless searches, State v. Phillips, 27 Ohio St. 2d 294 (1971), State v. Woodall, 16 O. Misc. 226 (1968). Both Phillips and Woodall involve searches incident to arrest. In a case involving a valid search warrant for a .38 revolver, a .38 shell, found in the course of a search which failed to disclose the gun itself, was admitted into evidence. The Court of Appeals stated that this situation was governed by Warden v. Hayden, supra; State v. Fields, 29 Ohio App. 2d 154, (1971).

The results of these cases indicate that although a search warrant in Ohio cannot justify an intrusion to look for mere evidence, if the initial intrusion was proper (eg. pursuant to a valid search warrant as in the instant case) mere evidence uncovered during the search was admissible. It is clear that objects in plain view of a police officer who has a right to be in the position where he is (eg. pursuant to a valid search warrant) are subject to seizure, and may be introduced into evidence, if the evidence is found to be relevant to a material issue.

5. WHETHER THE OHIO DEATH PENALTY STRUCTURE VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The issue presented by Petitioners is whether Ohio's statutory scheme, which imposes the death penalty, is constitutional in light of this court's most recent pronouncements on capital punishment as it relates to the Eighth Amendment. Respondent respectfully submits that Ohio law conforms with constitutional standards as defined by this court and as applied by the Supreme Court of Ohio.

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Following the decision in Furman v. Georgia, 408 U.S. 238, (1972), Ohio adopted Revised Code, Section 2929.02 (Appendix D) which prescribes the death penalty, or life imprisonment for a crime of aggravated murder. The procedure for determining whether the death sentence is to be imposed is set out in Revised Code, Section 2929.03 and Section 2929.04 (Appendix D). Those statutes permit the death penalty only where one or more aggravating factors is specified in the indictment and proved beyond a reasonable doubt. The aggravating circumstances include: Assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to, or is a candidate for any such office; murder for hire; murder to escape accountability for another crime; murder by a prisoner; repeat murder or mass murder; killing a law enforcement officer; and murder in the course of certain felonies.

The trier of fact may be either a jury, or if waived, a three judge panel. First the trier of fact is to consider whether the Defendant is guilty of the charge and, if found guilty, whether he is also guilty of one or more of the specifications, a sentence of life imprisonment is imposed and possibly a fine. If the Defendant is found guilty of the charge and guilty of one or more of the specifications, a separate hearing is held before the trial judge or the three judge panel to determine whether mitigating circumstances exist which preclude imposition of the death penalty. A pre-sentence investigation and a psychiatric examination are required to be made before the hearing, and other evidence and testimony may be submitted, including any statements by the Defendant. The death penalty is to be imposed if the trial judge or the three judge panel, unanimously finds that none of three possible mitigating factors has been established to exist by a preponderance of the evidence.

The mitigating factors are that: 1) The victim of the offense induced or facilitated it; 2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; and 3) The offense was primarily the product of the offender's psychosis or mental deficiency, although such condition is insufficient to establish the defense of insanity.

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Essentially, it may be seen that the Ohio statutes provide for a bifurcated trial in which the issues of guilt as to the charge, and of certain statutory defined aggravating circumstances, are determined by the jury or, if waived, by a three judge panel, and the issues of mitigation are determined by the trial judge, or by the three judge panel. If the sentence of death is affirmed by a court of appeals, a further appeal, as a matter or right, may be taken to the Ohio Supreme Court, as provided by Section 2 (B)(2)(a)(ii) Article IV of the Ohio Constitution (Appendix J).

The Ohio statutory scheme differs somewhat from any of those considered by the United States Supreme Court in its July 2, 1976 decisions, but it is basically similar to the Georgia, Florida and Texas statutes, which the court found to be constitutional. Each of those statutes provide for a bifurcated trial, with a separate sentencing hearing to consider information relevant to the imposition of sentence under standards to guide the sentencing authority in the use of that information. The statutes in North Carolina and Louisana, which were struck down, imposed mandatory death sentences, with no "particularized consideration of relevant aspects of the character and record of each convicted Defendant before the imposition upon him of the sentence of death". Woodson v. North Carolina, 49 L. Ed. 2d 944 (1976). The Ohio statutory scheme provides the framework in which the sentencing authority cannot wantonly or freakishly impose the death sentence.

It cannot be fairly charged that Ohio statutes are likely to result in capriciousness, arbitrary and discriminatory death sentences. More clearly than any of the states whose statutes were reviewed by the high court, Ohio has attempted to insulate the determination of guilt and of sentence from any likelihood of jury arbitrariness. The jury is directed to determine only guilt or innocence and whether the Defendant is guilty beyond a reasonable doubt of one or more aggravating factors specified in the indictment. Their responsibility is virtually the same as in any other criminal trial. The explicit nature of the specifications allows effective judicial review of whether the jury's verdict was supported by the evidence.

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Gregg v. Georgia, 49 L. Ed. 2d 859 (1976), specifically decided that the concerns expressed in Furman v. Georgia, supra, are adequately met and, as a general proposition, best met by a "system that provides a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information", Gregg v. Georgia, supra, at pg. 887. Ohio conforms to this description quite closely. Sentence is determined at a separate hearing, and only after the pre-sentence investigation and a psychiatric examination. Testimony and other evidence may also be submitted at this hearing. On the basis of this information, and considering the nature and circumstances of the offense, and the history, character and condition of the offender, the trial judge or the three judge panel are then to determine whether one or more of the three (3) statutory mitigating factors have been proved by a preponderance of the evidence.

The mitigating factors may require judicial interpretation and clarification, but they are basically reasonable and similar to those approved in Profitt v. Florida, 49 L. Ed. 2d, 913 (1976), and they do clearly guide the sentencing judge or judges in their decision. The Ohio Supreme Court independently reviews the aggravating and mitigating circumstances presented by the facts of each case to assure itself that capital sentences are fairly imposed by Ohio's trial judges. State v. Bayless, 48 O.St. 2d 73, 86 (1976).

Under the Supreme Court's decisions in Gregg v. Georgia, supra, Ohio's statutory framework for the imposition of capital punishment is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment.

VII. CONCLUSION

In summary, it is respectfully submitted that the court should deny a Writ of Certiorari in this case for three reasons. First, the Petitioner has not yet exhausted his state remedies on the question of incompetency of trial counsel. Secondly, Petitioners have failed to raise or preserve issues involving

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federal questions in the state courts. Thirdly, the Supreme Court of Ohio correctly decided the federal questions involved in accord with the decisions of this court. Accordingly, Respondent respectfully asks this court to deny the Writ of Certiorari in this case.

Respectfully submitted,

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and

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and

BY: Stephen K. Haller
STEPHEN K. HALLER
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Counsel for Respondent

CERTIFICATE OF SERVICE

I, Michael DeWine, counsel for Respondent herein, hereby certify that, on the 26 day of May, 1977, I served a copy of the foregoing Brief in Opposition of Certiorari, by mailing a copy in a duly addressed envelope, with first class postage prepaid to James F. Cox, Attorney for Petitioner, Allen Building, Xenia, Ohio 45385.

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Counsel for Respondent

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APPENDIX "A"

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IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

THE STATE OF OHIO	:	
PLAINTIFF,	:	CASE NO. 74-CR-149
-vs-	:	
ROBERT PAUL LYTLE	:	FINDINGS OF FACT, CONCLUSIONS
DEFENDANT.	:	OF LAW, AND DECISION

Aultman, J.
Rendered this 29th day of March, 1977.

The Defendant, Robert Paul Lytle, is before this Court upon a verified Petition filed pursuant to Section 2953.21, et. sec., of the Ohio Revised Code, seeking post-conviction relief from his previously imposed conviction and death sentence for the crime of aggravated murder.

The Petitioner claims he was denied his Constitutional rights during the presentation of his case on the following grounds:

1. He was denied the effective right to counsel as guaranteed by Section 10, Article I of the Ohio Constitution and the Sixth Amendment of the United States Constitution.

2. He was denied due process of law as guaranteed by Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution, such that,

a. The Court erroneously allowed

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Certified this 16 day of March 19 77
Clerk of Courts
Greene County Ohio

into evidence prior bad acts or crimes by the Defendant unrelated to the offense in issue constitution prejudicial error pursuant to Ohio Revised Code Section 2945.49, and,

b. The Court committed other prejudicial errors as spread upon the record.

Petitioner demanded that the Court, upon hearing, stay the execution and that the Court vacate the sentence heretofore imposed upon him.

Thereupon, this Court took additional testimony during a hearing held pursuant to Mr. Lytle's claim for post-conviction relief. During this hearing, Rodney Keish and Larry B. Morris, both of whom formerly represented Defendant Lytle, gave testimony, as did Nicholas Carrera, who represented the State of Ohio. Mr. Lytle also testified at this hearing. At the conclusion of the testimony, the State and Petitioner filed Memoranda in support of their contentions.

Therefore, from a consideration of all the evidence adduced, and the Memoranda filed, the Court hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Court finds that Rodney Keish, upon examination, represented that he was not adequately prepared to go to trial; that he did convey an impression to the Defendant that he could win the case; that he did tell the Defendant that the death penalty

was on the way out and that his choices in the matter essentially were (1) to plead guilty and get a life sentence; (2) stand trial and possibly get off altogether; (3) have the charge reduced and get life imprisonment since the death penalty was of no real concern.

The Court finds that the Defendant, Robert Paul Lytle, did not testify at the original trial of this matter upon the reliance of the representations of counsel, Mr. Keish, and that his case was rested with the presumption of innocence.

The Court finds that any purported plea bargain discussions, which might have taken place between former counsel, Larry Morris, and Prosecutor Carrera, were withdrawn at the time Mr. Keish began representing Mr. Lytle.

The Court finds that any purported defense, which Mr. Lytle may have had at the time of trial, was brought out, not by direct testimony from witnesses, but upon cross-examination of the State's witnesses, the introduction into evidence of the Defendant's statement, and the closing argument of counsel for the Defendant.

CONCLUSIONS OF LAW

As to the basic question as to whether the Defendant was denied the right to counsel as guaranteed by Federal and State Constitutions. The test in determining if the accused had effective retained counsel is whether the accused, under all the circumstances, including the fact that he had retained

counsel, had a fair trial and substantial justice was done. On these issues, the Defendant has the burden of proof.

Therefore, the Court finds on this issue in favor of the State of Ohio, since a properly licensed attorney, in the State of Ohio, is presumed to be competent.

The Court further finds, as a matter of law, that the issues which the Defendant Lytle seeks to raise by post-conviction relief, were fully and unsuccessfully litigated in the Appellate and Supreme Courts of this State.

As to the alleged ineffectiveness, and it's application to the matter of plea bargaining, This Court finds, as a matter of law, that to reverse or modify a decision arrived at through the deliberations of a jury, there must be a substantial violation of defense counsel's essential duties to his client, and this Court finds no evidence of same.

Further, the burden is on the Defendant to show that he was prejudiced by the failure of a plea bargain, and the Court finds, as a matter of law, that the Defendant has failed to sustain this burden.

The Court further finds, as a matter of law, that the evidence adduced in this post-conviction hearing, has failed to disclose any new facts which would indicate that the Defendant did not have a fair trial. The fact that Defendant rested without producing evidence was a trial tactic which counsel and Defendant discussed and the jury had the benefit of the contention of the

Defendant on the question of accident as evidenced by the cross-examination of the witness, David Arrasmith, the introduction into evidence of the statement of the Defendant, and the closing argument of Mr. Keish.

O P I N I O N

Therefore, in light of the above Findings of Fact and Conclusions of Law, IT IS THE OPINION OF THIS COURT that the Motion for post-conviction relief should be DENIED and OVERRULED.

Counsel may prepare proper Entry in conformity with this Opinion.

APPENDIX "B"

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ALICE KLENTZMAN, CLERK
COMMON PLEAS COURT
GREENE COUNTY

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO, *
Plaintiff * Case No. 74 CR 149
-vs- *
ROBERT PAUL LYTLE, *
Defendant * JUDGMENT ENTRY

* *

This matter came on for hearing on the 26th day of January, 1977, upon the Defendant's verified Petition filed pursuant to Section 2953.21, et sec., of the Ohio Revised Code, seeking post-conviction relief from his previously imposed conviction and death sentence for the crime of Aggravated Murder. The Defendant appeared in open Court, along with his attorneys James F. Cox and David W. Cox. The State of Ohio was represented by Prosecuting Attorney Michael DeWine, Assistant Prosecuting Attorney William F. Schenck, and Assistant Prosecuting Attorney Stephen K. Haller.

The matter proceeded to hearing on the 27th day of January, 1977, and continued on the 7th day of February, 1977. The defense called as witnesses Rodney Keish, Larry B. Morris, Dr. Lester Sontag, Dennis Sipe, and the Defendant Robert Paul Lytle. The State of Ohio called as witness former Prosecutor Nicholas A. Carrera.

At the conclusion of all the testimony, both the State and the Petitioner filed Memoranda in Support of their contentions.

Based upon the evidence, it is the opinion of the Court that the Motion for Post-Conviction Relief should be, and hereby is, denied and overruled.

Costs of the action are to be paid by the Defendant.

IT IS SO ORDERED.

JUDGE DAN M. ALTIMAN

Certified to be a true copy of the original filed May 13, 1977
Certified this 18 day of May, 1977
Greene County Ohio
Deputy Clerk of Courts

D:mld
3/77

Michael DeWine
Prosecuting Attorney

PROSECUTING ATTORNEY
Greene County
Xenia, Ohio 45385

James F. Cox
Attorney for Defendant

APPENDIX "C"

IN THE COURT OF COMMON PLEAS, GREENE COUNTY, OHIO

State of Ohio
PLAINTIFF

-vs-

Robert Paul Lytle
DEFENDANT

CASE NO. 74 CR 149

PETITION

Now comes the petitioner, Robert Paul Lytle, who brings this action pursuant to Ohio Revised Code, Section 2953.21 to 2953.24.

Petitioner is a prisoner in the Lucasville Correctional Institute having been found guilty upon trial, as charged, in an indictment for the crime of aggravated murder and sentenced to die in the electric chair by the trial Judge on the 6th day of January, 1975.

Petitioner claims that he was denied his constitutional rights during the presentation of this case in that:

(1) He was denied the effective right to counsel as guaranteed by Section 10, Article I of the Ohio Constitution and the Sixth Amendment of the United States Constitution;

(2) He was denied due process of law as guaranteed by Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution, such that,

(a) the court erroneously allowed into evidence prior bad acts or crimes by the defendant unrelated to the offense in issue constituting prejudicial error pursuant to Ohio Revised Code, Section 2945.59, and

(b) the Court committed other prejudicial errors as spread upon the record.

Petitioner alleges that the judgment entered against him was void under the provisions of the Ohio and United States Constitution.

WHEREFORE, petitioner demands that the Court stay execution of the judgment against him pursuant to Ohio Revised Code, Section 2953.21 (H); that this Court cause notice of the filing of this petition to be served on the County Prosecutor and that he be granted a hearing as provided by Ohio Revised Code, Section 2953.21 and that upon hearing, the judgment and sentence, be vacated and held for naught.

COX & BRANDABUR

BY: James P. Cox
Attorney for Defendant
Allen Building
Xenia, Ohio 45385
Telephone: 372-6921

STATE OF OHIO
SS:
GREENE COUNTY

ROBERT PAUL LYTLE, being first duly sworn, says that he is the defendant herein; that he has read the foregoing petition and that the allegation and statements therein are true as he verily believes.

Robert Paul Lytle
ROBERT PAUL LYTLE

Sworn to before me and subscribed in my presence this 10 day of APRIL, 1975.

Johnny Farmer
NOTARY PUBLIC JOHNNY FARMER
NOTARY PUBLIC, SCIOTO COUNTY, OHIO
MY COMMISSION EXPIRES APRIL 1, 1976

JC/rh

COX & BRANDABUR
ATTORNEYS AT LAW
HOUSE FEDERAL BLDG.
XENIA, OHIO 45385
372-6921

"dangerous offender," used in connection with determining sentences, eligibility for probation, and eligibility for early release on parole.

In general, repeat offenders are those with a history of persistent criminal activity and who appear to be bad risks for the future. A person is prima facie a repeat offender if he has served time on a prior conviction and is convicted of a second offense of violence, second sex offense, or second theft offense, or is convicted of a third felony, or of a fourth offense of any kind or degree (other than a minor misdemeanor, intoxication offense, or traffic offense).

"Dangerous offenders" are those who have committed an offense, whose history, character and condition reveal them as dangerous, and whose conduct shows a pattern of repetitive, compulsive, or aggressive behavior without thought for the consequences. The term "dangerous offender" equates with "psychopathic offender."

Transition — capital offenses.

Persons charged with a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense and, if convicted, sentenced to life imprisonment. If the section defining the offense provides for a lesser penalty under the circumstances of a particular case, then the lesser penalty must be imposed in that case.

Persons committing aggravated murder (the only capital offense in the new code) on and after January 1, 1974, must be charged and tried under the new law and, if convicted, may be subject to the death penalty. See, sections 2903.01, 2929.02 to 2929.04, and 2941.14.

Research Aids

21 AmJur2d: Criminal Law §§ 525 to 615

ALR

Effect of delay in taking defendant into custody after conviction and sentence. 98 ALR2d 687.

Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 ALR3d 335.

Necessity and sufficiency of question to defendant as to whether he has anything to say why sentence should not be pronounced against him. 96 ALR2d 1292.

Notice of application or intention to correct error in judgment entry in criminal cases. 14 ALR2d 224.

Racial discrimination in punishment for crime. 40 ALR3d 227.

Voluntary absence of accused when sentence is pronounced. 6 ALR2d 997.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence. 9 ALR3d 462.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.

PENALTIES FOR MURDER

§ 2929.02 Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

HISTORY: 134 v H 511. Eff 1-1-74.

Committee Comment

This section establishes the penalty for aggravated murder as life imprisonment or death, plus an optional fine of up to $25,000. The penalty to be imposed in a given case of aggravated murder is determined by the procedure given in sections 2929.03 and 2929.04. The penalty for murder is given as imprisonment for 15 years to life, plus an optional fine of $15,000. A fine for aggravated murder or murder may not be imposed unless the crime was committed for hire or profit, or in support of organized crime. Also, a fine or fines may not be imposed, which to the extent not suspended exceeds the amount the offender can pay without undue hardship to himself or his dependents, or which will prevent him from making reparation for the victim's death.

Research Aids

27 OJur2d Homicide §§ 202.1, 202.2
40 AmJur2d: Homicide §§ 552-557

ALR

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine. 31 ALR3d 926.

Propriety of general sentence [illegible] several counts in information or indictment [illegible] in aggregate the sentences which might have been imposed cumulatively under the several counts. 91 ALR2d 511.

CASE NOTES AND OAG

1. The decision of the U. S. Supreme Court in Furman v. Georgia compels the Ohio supreme court to modify death sentences imposed under [former] RC § 2901.01, reducing them to life imprisonment, but not to set aside first degree murder convictions, or to

invalidate the indictment: Vargas v. Metzger, 35 OS (2d) 116, 64 OO(2d) 70, 298 NE(2d) 600 (1973).

2. The infliction of any death penalty under the existing law of Ohio is now unconstitutional. State v. Leigh, 31 OS(2d) 97, 60 OO(2d) 80, 285 NE(2d) 333 (1972).

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

HISTORY: 134 v H 511, Eff 1-1-74.

Committee Comment

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by

the defendant, represent partial exceptions to the rules of evidence).

See Committee Notes re "Transition" following RC § 2929.04.

Research Aids

40 AmJur2d: Homicide §§ 552-557

ALR

Beliefs regarding capital punishment as disqualifying juror in capital case—Post Witherspoon Cases. 39 ALR3d 550.

Law Review

Confessions of guilt; necessity of additional evidence. (Case note.) 7 OSLJ 440.

CASE NOTES AND OAG

See case notes under RC § 2929.02.

1. The state must prove the material elements of the crime of murder in the first degree, including premeditation and deliberation, beyond a reasonable doubt, in order to resolve the degree issue in the hearing under [former] RC § 2945.06: State v. Taylor, 30 OApp(2d) 252, 59 OO(2d) 398, 285 NE(2d) 89.

2. Where a person charged with an offense punishable by death under GC § 12400 (RC § 2901.01) elects to be tried by a three-judge court under this section, the rule in respect to granting or witholding mercy is the same as that in effect when trial by jury is had, since the judges under this section "have power to decide all questions of fact and law" and may "extend mercy and reduce the punishment . . . in like manner as upon recommendation of mercy by a jury." In such cases the exercise of power of the judges to grant or withhold mercy given by this section and GC § 12400 (former RC § 2901.01) rests soley within their sound discretion in the light of the facts and circumstances disclosed by the evidence: State v. Lucear, 93 App 281, 51 OO 39, 109 NE(2d) 39.

3. Under this section a three-judge court has the jurisdiction, under a plea of guilty to a charge of murder while attempting to perpetrate a robbery, to decide the case and sentence the defendant without a waiver in writing as contemplated by GC § 13442-4 (former RC § 2945.05): State ex rel Scott v. Alvis, 62 OLA 241, 107 NE(2d) 211 (App).

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

HISTORY: 134 v H 511. Eff 1-1-74.

Committee Comment

This section provides that the death penalty for aggravated murder is precluded unless one of seven listed aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The seven aggravating circumstances deal with: (1) assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office; (2) murder for hire; (3) murder to escape accountability for another crime; (4) murder by a prisoner; (5) repeat murder or mass murder; (6) killing a law enforcement officer; and (7) felony murder.

municipal corporation. Like proceedings shall be had in such higher court at the hearing of the appeal as in the review of other criminal cases. The clerk of the court rendering the judgment sought to be reversed, on application of the prosecuting attorney, attorney general, or solicitor, shall make a transcript of the docket and journal entries in such case, and transmit it with all bills of exceptions, papers, and files in the case, to such higher court.

HISTORY: GC § 13459-14; 113 v 123 (214), ch.55, § 14; 116 v 104 (119), § 2. Eff 10-1-53. Analogous to former GC § 13764.

[POST-CONVICTION DETERMINATION OF CONSTITUTIONAL RIGHTS]

§ 2953.21 Petition to vacate or set aside sentence.

(A) Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by the petitioner on the prosecuting attorney. The clerk of the court in which the petition is filed shall immediately forward a copy of the petition to the prosecuting attorney of that county.

(C) Before granting a hearing the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including but not limited to the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript. Such court reporter's transcript if ordered and certified by the court shall be taxed as court costs. If the court dismisses the petition it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within such further time as the court may fix for good cause shown, the prosecuting attorney shall respond by demurrer, answer, or motion. Within twenty days from the date the issues are made up either party may move for summary judgment as provided in section 2311.-041 [2311.04.1] of the Revised Code. A bill of exceptions is not necessary in seeking summary judgment. The right to such judgment must appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues, hold the hearing, and make and file written findings of fact and conclusions of law upon entering judgment thereon.

(F) At any time before the demurrer, answer, or motion is filed, the petitioner may amend his petition with or without leave or prejudice to the proceedings. The petitioner may amend his petition with leave of court at any time thereafter.

(G) If the court finds grounds for granting relief, it shall, by its judgment, vacate and set aside the judgment, and shall, in the case of a prisoner in custody, discharge or resentence him or grant a new trial as may appear appropriate. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail.

(H) Upon the filing of a petition pursuant to this section by a prisoner in a penal institution who has received the death penalty the court may stay execution of the judgment challenged by the petition.

HISTORY: 131 v 684 (Eff 7-21-65); 132 v H 742, § 1. Eff 12-9-67.

§ 2953.22 Hearing.

If a hearing is granted pursuant to section 2953.21 of the Revised Code, the petitioner shall be permitted to attend such hearing. Testimony of the prisoner or other witnesses may be offered by deposition.

If the petitioner is in a penal institution he may be returned for such hearing upon the warrant of the court of common pleas of the county where the hearing is to be held. The approval of the governor on such warrant shall not be required. The warrant shall be directed to the sheriff of the county in which the hearing is to be held. When a copy thereof is presented to the warden of the penitentiary, the superintendent of a state reformatory, or other head of a state penal institution, he shall deliver the convict to the sheriff who shall convey him to such county. For removing and returning such convict the sheriff shall receive the fees allowed for conveying convicts to the penitentiary.

HISTORY: 132 v H 742, § 1. Eff 12-9-67.

§ 2953.23 Appeal.

(A) Whether a hearing is or is not held, the court may, in its discretion and for good cause shown, entertain a second petition or successive petitions for similar relief on behalf of the

petitioner based upon the same facts or on newly discovered evidence.

(B) An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

HISTORY: 132 v H 742, § 1. Eff 12-9-67.

§ 2953.24 Repealed, 136 v H 164, § 2 [132 v H 742]. Eff 1-13-76.

§ 2953.31 [Definition.]

As used in sections 2953.31 to 2953.36 of the Revised Code, "first offender" means anyone who has once been convicted of an offense in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act, or result from offenses committed at the same time, they shall be counted as one conviction.

HISTORY: 135 v S 5. Eff 1-1-74.

§ 2953.32 [Expungement of record of conviction.]

(A) A first offender may apply to the sentencing court if convicted in the state of Ohio or to a court of common pleas if convicted in another jurisdiction for the expungement of the record of his conviction, at the expiration of three years if convicted of a felony, or at the expiration of one year if convicted of a misdemeanor, after his final discharge.

(B) Upon the filing of such application, the court shall set a date for hearing and shall notify the prosecuting attorney of the hearing on the application. The court shall direct its regular probation officer, a state probation officer, or the department of probation of the county where the applicant resides to make such inquiries and written reports as the court requires concerning the applicant.

(C) If the court finds that the applicant is a first offender, that there is no criminal proceeding against him, that his rehabilitation has been attained to the satisfaction of the court, and that the expungement of the record of his conviction is consistent with the public interest, the court shall order all official records pertaining to such case sealed and all index references deleted. The proceedings in such case shall be deemed not to have occurred and the conviction of the person subject thereof shall be expunged, except that upon conviction of a subsequent offense, the sealed record of prior conviction may be considered by the court in determining the sentence or other appropriate disposition, including the relief provided for in sections 2953.31 to 2953.33 of the Revised Code. Upon the filing of an application under this section, the applicant shall, unless he is indigent, pay a fee of fifty dollars. The court shall pay thirty dollars of such fee into the state treasury; and twenty dollars into the county general revenue fund if the expunged conviction was under a state statute, or into the general revenue fund of the municipal corporation involved if the expunged conviction was under a municipal ordinance.

(D) Inspection of the records included in the order may be made only by any law enforcement officer, prosecuting attorney, city solicitor, or their assistants, for purposes of determining whether the nature and character of the offense with which a person is to be charged would be affected by virtue of such persons having previously been convicted of a crime or upon application by the person who is the subject of the records and only to such persons named in his application. When the nature and character of the offense with which a person is to be charged would be affected by such information, it may be used for the purpose of charging the person with an offense.

(E) In any criminal proceeding, proof of any otherwise admissible prior conviction may be introduced and proved, notwithstanding the fact that for any such prior conviction an order of expungement was previously issued pursuant to sections 2953.31 to 2953.36 of the Revised Code.

HISTORY: 135 v S 5. Eff 1-1-74.

§ 2953.33 [All rights and privileges restored.]

(A) An order of expungement of the record of conviction restores the person subject thereof to all rights and privileges not otherwise restored by termination of sentence or probation or by final release on parole.

(B) In any application for employment, license, or other right or privilege, any appearance as a witness, or any other inquiry, except as provided in division (E) of section 2953.32 of the Revised Code, a person may be questioned only with respect to convictions not expunged, unless the question bears a direct and substantial relationship to the position for which the person is being considered.

HISTORY: 135 v S 5. Eff 1-1-74.

§ 2953.34 [First offender may still take appeal or seek relief.]

Nothing in sections 2953.31 to 2953.33 of the Revised Code precludes a first offender from taking an appeal or seeking any relief

appeal and not by habeas corpus: State ex rel Bednarik v. Alvis, 74 OLA 258, 140 NE(2d) 59 (App).

26. The provision in GC § 13459-3 (RC § 2953.04) requiring the briefs and assignments of error to be filed with the transcript is mandatory, and a motion to dismiss the appeal will be sustained for failure to comply with this requirement: State v. Watson, 74 OLA 28, 139 NE(2d) 63 (App).

27. This section is not jurisdictional and the provisions thereof as to the filing of brief by appellant is directory only, resting the matter of filing brief in criminal cases within the sound discretion of the appellate court, in the exercise of which the court may grant additional time to file such brief: State v. Brunswick, 56 OLA 207, 91 NE(2d) 553 (App).

28. The dismissal of an appeal for failure to file with the transcript a brief containing the assignments of error relied upon is proper in view of the mandatory requirement of this section: Columbus v. Balzan, 38 OLA 141, 49 NE(2d) 592 (App); State v. Barber, 44 OLA 381 (App); State v. Davis, 47 OLA 415 (App).

29. Failure to comply with the mandatory provisions of this section by filing the brief with the transcript is ground for dismissal of the appeal: State v. Smith, 33 OLA 612.

30. A motion to dismiss an appeal filed by defendant in a criminal case, on the ground that briefs were not filed within the time prescribed by this section, will not be sustained: State v. Jones, 33 OLA 330, 34 NE(2d) 990.

31. Where in an appeal in a criminal case, the appellant fails to file a brief with the transcript of the record in the court of appeals, that court should affirm the judgment where no error appears of record, in view of the provisions of this section, requiring prompt consideration of proceedings to review criminal case: State v. Link, 28 OLA 101.

§ 2953.05 Appeals.

Appeal under section 2953.04 of the Revised Code, may be filed as a matter of right within thirty days after judgment and sentence or from an order overruling a motion for a new trial or an order placing the defendant on probation and suspending the imposition of sentence in felony cases, whichever is the latter. Appeals from judgments or final orders as above defined in magistrate courts shall be taken within ten days of such judgment or final order. After the expiration of the thirty day period or ten day period as above provided, such appeal may be taken only by leave of the court to which the appeal is taken. An appeal may be taken to the supreme court by giving notice as provided by law and rule of such court within thirty days from the journalization of a judgment or final order of the court of appeals in all cases as provided by law.

HISTORY: GC § 13459-4; 113 v 123 (212), ch 38, § 4; 116 v 104 (117), § 2; 128 v 141. Eff 1-1-60.

Comment: See related Crim. R. 32 (A) (2).

Law Review

Legislative changes in procedural matters and appeals. Judge Lee E. Skeel. 33 OBar (No. 22) 625.

CASE NOTES AND OAG

INDEX

1. Revised Code §§ 2953.02 to 2953.14, inclusive, do not provide for an appeal on behalf of the state from the action of a trial judge in granting a defendant's motion for a new trial: State v. Huntsman, 18 OS(2d) 206, 47 OO(2d) 440, 249 NE(2d) 40 (1969).

2. An indigent appellant is not required to show probable error to overcome the presumption of regularity of the proceedings under which he was sentenced where his notice of appeal was delivered timely to prison official but not forwarded to court of appeals: State v. Webb, 11 OS(2d) 60, 40 OO(2d) 66, 227 NE(2d) 625.

3. After a defendant's conviction of the crime of sodomy under RC § 2905.44, and before sentence, his referral by a court of competent jurisdiction to an approved state facility for observation for a period of not more than sixty days as provided by RC § 2947.25, is not a final appealable order but a procedural incident, and in accordance with RC § 2953.05, any appeal must await and follow the imposition of sentence: State v. Thomas, 175 OS 563, 26 OO(2d) 253, 197 NE(2d) 197.

4. This section limits the time for such appeal by referring to "after judgment and sentence or from an order overruling a motion for a new trial or an order placing the defendant on probation and suspending the imposition of sentence," all indicating the general assembly was contemplating appeals by defendants and not by the state: Toledo v. Crews, 174 OS 253, 255, 22 OO(2d) 290, 188 NE(2d) 592.

5. General Code §§ 13445-1 and 13459-4 (RC §§ 2945.65 and 2953.05), are in pari materia, and where, in a criminal case, the trial court overrules a motion for a new trial filed by a convicted accused, the journalization of such overruling must be contemporaneous with or subsequent to the journalization of the judgment of sentence of such accused; any other journalization of the overruling is a nullity: State v. Nickles, 159 OS 353, 50 OO 322, 112 NE(2d) 531.

6. The allowance by a trial court of the prosecution's motion to nolle prosequi, made and allowed before the selection of a jury has commenced, is not a judgment or final order and, in the absence of an abuse of discretion, is not appealable: Columbus v. Stires, 9 OApp(2d) 315, 38 OO(2d) 377, 224 NE(2d) 369.

7. An appeal from a final order of the court in a criminal case must be taken within ten days of the judgment (sentence), or within ten days of the overruling of motion for new trial, if filed, or within ten days of an order suspending the imposition of sentence and placing the defendant on probation, whichever is the later: Cleveland v. Gunn, 8 OApp(2d) 301, 37 OO(2d) 310, 221 NE(2d) 714.

8. An attempted appeal to the court of appeals will be dismissed for want of jurisdiction, where the

poses to offer in his defense, testimony to establish an alibi on his behalf, such defendant shall, not less than three days before the trial of such cause, file and serve upon the prosecuting attorney a notice in writing of his intention to claim such alibi. Notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense. If the defendant fails to file such written notice, the court may exclude evidence offered by the defendant for the purpose of proving such alibi.

HISTORY: GC § 13444-20; 113 v 125 (190), ch.23, § 20. Eff 10-1-53.

Comment: This section is superseded by Crim. R. 12.1.

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Use of judge's discretion and constitutionality of the Ohio "alibi statute." Case note. 24 OSLJ 693.

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1. The privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses: Williams v. Florida, 399 US 78, 53 OO (2d) 53, 26 LEd(2d) 446, 90 SCt 1893.

2. Where defense counsel's failure to investigate and introduce evidence establishing an alibi has denied the accused the effective assistance of counsel, a conviction will be reversed: Johns v. Perini, 462 F(2d) 1308, 66 OO(2d) 69 (1972).

3. Where it appears that the prosecuting attorney had no objection to defendant's testimony about his employment, but he vigorously opposed any attempt to buttress the claims of alibi by employment records or other means, and it is not clear whether defense counsel made a tactical decision not to introduce the documentary evidence or whether he was precluded from doing so because he had neglected to give notice of intention to rely upon an alibi, a writ of habeas corpus will be issued: Johns v. Perini, 440 F(2d) 577, 59 OO(2d) 71.

4. Language in alibi instructions directing the jury to **acquit if all the evidence in the case raises a reasonable doubt of guilt** does not erroneously shift the burden of proof from the state where other language in the charge clearly explains that the burden remains upon the state: State v. Childs, 14 OS(2d) 56, 43 OO(2d) 119, 236 NE(2d) 545.

5. This section protects the state against false and fraudulent claims of alibi often presented by accused near close of trial: State v. Thayer, 124 OS 1, 176 NE 656.

6. A verdict of guilty will not be disturbed where no abuse of discretion appears in the trial court excluding testimony offered by the accused for purpose of proving an alibi, no notice of which has been given the state: State v. Nooks, 123 OS 190, 174 NE 743.

7. The failure of the trial court, in a criminal case, to charge the jury on the law regarding alibi is not prejudicial to the defendant, where no request for such an instruction was made and the testimony of defendant's alibi witnesses, even if belived by the jury, would not necessarily preclude his involvement in the offense charged or establish the defense of alibi: State v. Goode, 118 App 479, 25 OO(2d) 395, 195 NE(2d) 581.

8. This section is mandatory in its terms, and a defendant who proposes to claim an alibi as a defense is required to file and serve on the prosecuting attorney written notice thereof: State v. Payne, 104 App 410, 5 OO(2d) 87, 149 NE(2d) 583.

9. It is prejudiciously erroneous for the prosecutor in a criminal case to comment upon a notice that evidence would be offered to prove an alibi under this section, when such notice has not been filed with the papers and has not been offered in evidence, and no evidence is proffered of such alibi: State v. Cocco, 73 App 182, 28 OO 283, 55 NE(2d) 430 [appeal dismissed, 142 OS 276].

10. Charge on presumption of innocence and reasonable doubt is not sufficient to cover issue of alibi and refusal to charge on alibi, when requested, was error: McGoon v. State, 39 App 212, 177 NE 238.

11. This section, providing for three days notice before trial by the accused if he is going to produce evidence of an alibi and leaving it within the sound discretion of the trial court to admit such evidence if this section is not complied with is constitutional: State v. Cunningham, 89 OLA 206, 185 NE(2d) 327 (App).

12. The right of one accused of crime to testify in his own behalf is not a constitutional right, but is a right given to him by statute, and the legislature was clothed with authority to limit and regulate such right at the time it enacted this section: Smetana v. State, 22 OLA 165.

13. Oral notice to prosecutor that defendant intends to prove an alibi does not comply with this section: Balzhiser v. State, 35 OLR 120.

14. As to the sufficiency of a notice under this section, see Woodruff v. State, 31 OLR 540.

§ 2945.59 Proof of defendant's motive. (GC § 13444-19)

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

HISTORY: GC § 13444-19; 113 v 125 (190), ch.23, § 19. Eff 10-1-53.

Comment: See related Crim. R. 16(B) (1) (b). See also RC §§ 2901.21 and 2901.22.

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Evidence of criminal history in Ohio criminal prosecutions. Editorial note. 15 WestResLRev 772.

Proof of other crime. (Case note.) 5 OSLJ 232.

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APPENDIX "H"

PETITIONER'S BRIEF BEFORE THE STATE SUPREME COURT

ASSIGNMENT OF ERROR

The Court erred in that:

3. The Court erred in allowing into evidence prior bad acts or crimes by the defendant unrelated to the offense in issue, constituting prejudicial error pursuant to the Ohio Revised Code, Section 2945.59.

Note: The Ohio Rule of Criminal Procedure 41 was attached to this brief as an Appendix, but was not of reproducible quality. The same holds true for Article IV, Section 1 & 2 of the Ohio Code Supplement.